Supreme Court of the United States.

October Term, 1928.

No. 125.

FRED T. LEY & COMPANY, INCORPORATED,
Appellant,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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Appeal from the Court of Claims.
Reported 60 C. Cls. 654.

BRIEF FOR APPELLANT.

Jurisdiction of this Court.

1. The judgment to be reviewed was rendered May 4, 1925, and dismissed the petition of the claimant (record, p. 12).

2. The claim was advanced that on a cost-plus contract for the construction of a cantonment during the World War the cost of a premium on bond of public liability insurance was a part of the cost of the work reimbursable by the Government as was allowed in *Mason & Hanger Company* v. *United States*, 56 C. Cls. 238, Finding V, p. 241, end of opinion foot p. 242, affirmed 260 U. S. 323, 261 U. S. 610, which was also allowed by the Court of Claims in the case of *Bates & Rogers Construction Company* v. *United States*, 51 C. Cls. 392, Finding V, pp. 396, 397.

The contract in this case was identical with the two just named, as well as with those for the other great cantonments (Finding II, at end, record, middle p. 9).

The ruling was that as the taking out of said liability insurance was not specifically approved in this case by the contracting officer, the claimant was not entitled to recover (memorandum opinion, pp. 11, 12).

3. The jurisdiction of this court arises under Judicial Code, Section 242, allowing an appeal to the Supreme Court from judgments of the Court of Claims on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000, and the saving clause of Section 14 of the act of February 13, 1925. Chap. 229, 43 Stat. 936, 942. The act was to take effect three months after its approval but not to affect the right to a review in respect to judgments entered prior to the date when it took effect. This judgment was rendered May 4, 1925, and is therefore within the saving clause.

Statement of the Case.

This suit was brought by Fred T. Ley & Co., Inc., one of the contractors for the sixteen great war cantonments, for the recovery of premiums on public liability insurance as part of the cost of the work. The premiums so paid and for the recovery of which suit was brought amount to $10,190.15.

The contract was identical in form and provisions with the contracts for the fifteen other cantonments all over the United States (Finding II, record, p. 9). The material portions of the contract are printed, record, pp. 4–8. One of these was the contract in the case of *Mason & Hanger Company*, 56 C. Cls. 238, affirmed 260 U. S. 323; 261 U. S. 610. It was also in

the same form as in *Bates & Rogers Construction Co.* v. *United States*, 58 C. Cls. 392, end Finding II, p. 394. Another sample of such contract is given in *United States* v. *Bentley*, 293 Fed. 229, 232–234.

Insurance was taken out against public liability. The actual costs incurred and paid by the contractor amounted to $10,190.15 (Finding VI, record, p. 11). The taking out of this insurance is found to have been disapproved by the contracting officer (Finding III, record, p. 9).

June 28, 1917, a telegram or night message was addressed by the contracting officer to plaintiff and to each of the other fifteen contractors notifying them to obtain insurance against fire and workmen's compensation, and stating that other insurance risks were assumed by the Government and that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect (Finding IV, record, top p. 10).

August 8, 1917, the contracting quartermaster sent the officer in charge of cantonment construction these policies for public liability insurance.

August 10, 1917, they were returned to the contracting quartermaster disapproved on account of that form of insurance not being authorized.

Further correspondence followed "with the result that the contracting officer declined to approve the taking out of policies covering the same" (Findings IV, V, pp. 10, 11, somewhat abbreviated).

The court found that the evidence fails to show that the public liability insurance taken out by the plaintiff was ever required, approved or ratified by the contracting officer, or by any duly appointed representative of his (Finding VII, record, p. 11).

The petition, Par. V, record (pp. 2, 3), alleges that a certificate of approval of insurance of this same character in the substantially identical case of *Mason & Hanger Company*, contractors for the construction of Camp Zachary Taylor, Kentucky, was intended as a general approval of all such public liability insurance, and was made with the object of submitting the question to the Comptroller of the Treasury; that it was in effect a ratification and approval of the taking out of such insurance in this case, and but for the action of the Comptroller in declining to sanction payment of such expense the contracting officer would have formally approved and paid such costs.

It is found by the Court of Claims, Finding II, p. 9, that this contract was one of sixteen for cantonments throughout the country. One was that of the Mason & Hanger Company for Camp Zachary Taylor, Kentucky. Another was with the Bates & Rogers Construction Company for the construction of Camp Grant, Illinois.

June 28, 1917, a telegram or night message was addressed by the contracting officer to all sixteen of these contractors, thus showing that identical action was intended to be taken in all of them.

The Court of Claims entered judgment dismissing the petition (memorandum opinion, pp. 11, 12; judgment, p. 12). This judgment was entered May 4, 1925, and the case is reported 60 C. Cls. 654. An appeal was duly taken to this court.

Assignment of Error.

The appellant assigns the following error in the opinion and judgment of the Court of Claims:

That said court failed to hold that the premium on liability insurance policies paid by the contractor who

is appellant in this case was a proper part of the cost of the work under a cost-plus contract and reimbursable to the contractor, and failed to give judgment for the amount of said premium, amounting to $10,190.15, and dismissed the petition, whereas the Court of Claims should have given judgment for the cost of public liability insurance amounting to $10,190.15.

BRIEF OF ARGUMENT.

The Question Involved.

Sixteen contracts were made for great Army cantonments in various parts of the United States for housing the soldiers, enlisted or drafted for the World War. The cost of these cantonments ranged from $8,000,000 to $12,000,000. A list of the sixteen with the names of the contractors and the cost of each contract is given in Hearings on the Army Appropriation Bill for 1919, Vol. 1, pp. 895–900, 65th Congress, 2d Session.

The scheme of these contracts was that the Government should pay the cost of all elements entering into construction, with a percentage of profit which was in no event to exceed $250,000. One of the items defined as part of the cost of the work was "Such bonds, fire, liability and other insurance as the contracting officer may approve or require."

The question whether insurance against public liability was a necessary part of the cost of the work came up at a very early date.

In the case of *Mason & Hanger Company*, contractors for Camp Zachary Taylor, Kentucky, the question of public liability insurance was submitted to the Comptroller as follows:

"Major Dempsey, who on July 16, 1917, had ceased to be the contracting officer on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the aforesaid amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff." (56 C. Cls. 238, Finding V, p. 241.)

These items were included in the judgment in favor of Mason & Hanger Company (p. 242).

The case came to this court. No error was assigned on the allowance of these items of public liability insurance but only on the premium on the bond for faithful performance. The judgment was affirmed 260 U. S. 323; 261 U. S. 610.

The next case before the Court of Claims was that of *Bates & Rogers Construction Company*, contractors for Camp Grant, Illinois, 58 C. Cls. 392.

They took out public liability insurance of precisely similar character. Finding V in that case (pp. 396, 397) constitutes a finding of the general facts in regard to all these cantonment contracts:

"Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of public liability insurance and paid premiums thereon

to the insurance companies amounting to the sum of $11,764.59, the rates of which insurance had been fixed by agreement between the insurance companies and the contracting quartermaster, representative on the work of the contracting officer, which rates were substantially less than the usual and customary rates of such insurance. Major Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 19 through a subordinate officer refused to approve policies of insurance that had been submitted including public liability. The plaintiff protested that the liability insurance had been taken out under instructions of the representatives of the contracting officer; that such insurance was necessary alike for the protection of the Government and the contractor; and that such insurance could not safely be dispensed with. The disapproval of the above-named officer extended not alone to the liability insurance taken out by the plaintiff but to that taken out by other cantonment contractors. On December 22, 1917, Col. I. W. Littell, contracting officer, approved the action of the contractor for cantonment at Camp Taylor in taking out policies of liability insurance and authorized and directed the representative, the constructing quartermaster, to reimburse that contractor for the cost of premiums on such insurance. The construction quartermaster submitted the question of payment of cost of such insurance to the comptroller of the Treasury, who decided that the amount paid for insurance should not be reimbursed to the contractor there involved. This decision was taken as extending to like expenditures made by other contractors, including the plaintiff, by both Colonel Littell, who was then contracting officer, and General Marshall, his successor. The contracting officer, as above stated, approved the cost of liability insurance under another contract as a proper part of the reimbursable cost of the work, and on March 26, 1918, in submitting the case of another contractor to the Auditor for payment decided that the cost of premiums upon public liability insurance was a legitimate part of the cost of work under 'the contract for

emergency work,' and in letter of December 30, 1919, the contracting officer stated that he had refused to approve claims of other contractors similar to the Mason & Hanger Co. claim only because of the action of the Comptroller in that case and that there was no difference between the claim of the plaintiff company and that of the Mason & Hanger Co. The plaintiff made a total expenditure of $11,764.59 on account of cost of public liability insurance, for no part of which has it been reimbursed by the United States."

It was agreed by the United States and the claimant in the Court of Claims that that case was to be governed by the *Mason & Hanger* case (Finding VI, 58 C. Cls. 397). Judgment was rendered accordingly in favor of the contractors in that case for the premiums on public liability insurance. From that judgment no appeal was taken.

This case does not differ in principle from the *Mason & Hanger* case. It does not differ even in the smallest detail from the *Bates & Rogers* case.

This is practically admitted in the Memorandum Opinion in this case where it is said (record, p. 12) "that plaintiff relies on the approval in the *Mason and Hanger* case as having been intended as an approval of like action under all similar contracts. We think the approval in the *Mason and Hanger* case was for the purpose of submitting a question to the comptroller."

The question is whether a mere difference in the form of finding the nature of the action of the War Department in those cases and in this shall make a difference where the nature of the items is identical in every particular. There were sixteen of these contracts for great cantonments. It would be a singular result that when the action of the officers of the United States in regard to all of the sixteen contracts was

identical, a mere difference in the form of finding that action should allow the amount of these premiums for public liability insurance to two of the contractors and deny it to a third. No such intent appears on the part of the War Department. The amount having been allowed to two previous contractors should similarly be allowed to this one.

Intent of the Contract.

The material provisions of the contract are as follows:

"*Article II. Cost of the Work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * * * *

"(h) Such bonds, fire, liability and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor.

"*Article III. Determination of Fee.*—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

* * * * * * * * *

"The total fee to the contractor hereunder shall in no event exceed the sum of $250,000, anything in this agreement to the contrary notwithstanding.

"*Article VI. Special requirements.*—The contractor hereby agrees that it will:

* * * * * * * * *

"(c) Procure, and thereafter maintain such insurance, in such forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

* * * * * * * * *

"*Article XIV. Settliment of disputes.*—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern." (Record, pp. 5–8.)

The words "liability and other insurance" are certainly broad enough to include policies of insurance against liability of the contractor for accidents to the public.

It is true that the contractor was first notified June 28, 1917, "that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect" (Finding IV, p. 10). This position was subsequently receded from, as is made clear by the findings of fact in the *Mason & Hanger* and *Bates & Rogers* cases, quoted, *ante*, pp. 6–8.

Premiums on Public Liability Insurance.

Premiums on policies of insurance of contractors against liability for damages to the public were clearly within both the letter and spirit of the contract. It is true that such injuries usually arise out of the fault or neglect of some one employed by the contractor and that the negligence of that employee is attributable by a rule of law to the contractor.

The question whether premiums of this kind are covered by a cost-plus contract arose in *United States* v. *Standard Oil Company*, 258 Fed. 697, affirmed 264 Fed. 66. The question there was whether the contractor or the subcontractor should bear the damage occasioned by a marine disaster. The Raymond Concrete Pile Company agreed with the Standard Oil Company to construct a concrete pier, and was to receive as compensation 12½ per cent of the cost of the work, not exceeding $20,000. The Standard Oil Company was to pay all of the cost of the work, cost being defined to include among other items "the cost of insurance and any expense incurred in connection with any accident or damage to person or property" (264 Fed. foot p. 67).

Both the District Court and the Circuit Court of Appeals held that damages due to accident, even though arising from the fault of some agent or employee of the cost-plus contractor, were a part of the cost of the work, whether the liability was covered by insurance or not.

The District Court, 258 Fed. 701, 702, said:

"An analysis of the agreement shows that the Standard hired the experience, skill, and general executive organization of the Raymond, to organize, direct, and oversee, subject to the instructions of the Standard, the doing of the work for which the Standard was to pay. The Raymond was to receive 12½ per cent on the cost of the work, with a provision that its fee should not exceed $20,000. In return the Raymond was to furnish, at its New York offices, the services of its executive officers. For practically everything else the Standard was to pay. Some specified heavy tools and machinery were to be hired from the Raymond at a per diem rental. The other costs to be borne by the Standard were enumerated in great detail. In short, as the contract itself declares, the Raymond was employed to do the work as the agent of the Standard, and at the

latter's charge. The cost of insurance and other expenses incurred in connection with any accident or damage to person or property was expressly mentioned among the things for which the Standard was to pay, and the same point was further emphasized by the declaration of the Raymond, in its letter confirming the acceptance of the contract:

"'That any expense incurred in connection with any accident or damage done upon person or property, not covered by insurance shall be considered a part of the cost of the work, but no fee shall be paid to the contractor on this cost.'

"It is easy to conceive of accidents which are not the result of the negligence of any one, but after all they are few as compared with the number of those which happen because some one has done that which he ought not to have done, or has left undone that which he ought to have done.

"The parties to this contract were aware that it was highly probable that in the doing of the work there would be accidents, damaging life, limb, or estate. They knew that most of them would be the result of carelessness of some one employed by the Raymond. There could have been no question that, if the work was to be done at reasonable cost, the Raymond would have to use every-day people of about the average of care and skill, and that some of them, at some time or other, would be careless, and once in a while would hurt somebody or something. The damage thus done, no matter who paid for it, would be as much a part of the cost of the work as were the sums paid for labor, fuel, or tools. The undertaking by the Standard to assume liability for such damage was of a piece with the whole scheme of the bargain it was making."

The Circuit Court of Appeals, Fourth Circuit, affirming the judgment said (*Standard Oil Co.* v. *United States*, 264 Fed. 66, 69, 70):

"It is true as a general rule that no one can rid himself in advance of the obligation to use due care imposed

by law or assumed by contract. So here the Raymond Company can not escape its liability to the libelants by referring them to the contract with the Oil Company. But the rule does not extend to denial of the right of one about to undertake work requiring the use of fire and dangerous machinery to contract with an insurance company, or the other party to the contract for the work, for indemnity against losses from the negligence of its employees. In modern conception such losses are as certain in the long run as the expenditures for material, labor, interest on money, insurance, and delay from weather conditions or strikes. Every person who undertakes such work either for himself or as independent contractor or as a responsible agent estimates this factor of cost as an item of business risk. In this instance the contract was by the Raymond Company as agent of the Oil Company to plan and superintend the work, to hire and direct the laborers. The Oil Company assumed all other costs and liabilities incurred in the course of the enterprise. There is no reason why the factor of liability for accidents should not be placed by agreement on the Oil Company's side of the contract. This assumption of liability by the Oil Company of the items of outlay for accidents due to occasional acts of negligence to be expected of the servants employed on the work was no more unreasonable or against public policy than the assumption of the other expenses of the work which the Raymond Company might see fit to incur. As to these matters the obligation assumed by the Oil Company was subject to the implied duty of the Raymond Company of due effort to keep the costs within reasonable bounds, and to use due diligence to obtain competent servants and supervise the work with due care. Intentional or reckless disregard of either duty would have been ground of relief to the Oil Company on the ground of breach of the contract. But there was no other limitation to the promise of the defendant to pay the costs and damages incident to the enterprise. These conclusions are in accord with *Westinghouse, Church, Kerr & Co.* v. *Long Island Railroad Co.*, 160 App. Div. 200;

145 N. Y. Supp. 201, affirmed 216 N. Y. 697; 110 N. E. 1051. We find no other case directly in point."

On a rehearing, 266 Fed. 690, it was held that such accidents were a part of the cost of the work, whether covered by insurance or not.

In *Westinghouse* v. *Long Island Railroad Company*, *supra*, the court said (160 N. Y. App. Div. 200, affirmed 216 N. Y. 697):

"The contract was (so far as the construction part is concerned) what is known as a 'percentage' contract, by which the contractor supplies labor and material at cost and receives as his compensation a fixed percentage thereon in lieu of other profit. The plainly-expressed intent and meaning of the parties was that, excluding its overhead expenses, plaintiff was to be reimbursed for all cost and expense incurred in the performance of the work. On the face of the contract it is apparent that it involved a work of considerable magnitude, and required the employment of many artisans and laborers, and that in the distribution of the forces employed plaintiff would necessarily be compelled to rely on the skill and prudence of many for whose negligence plaintiff would be responsible. In a work of this description accidents are certain to occur; so certain in fact that the law of averages permits them to be made the subject of insurance and to be covered by policies issued by corporations organized by virtue of general laws and doing business under State inspection. The cost of such accidents, direct and indirect, including the expense of compensating the injured and of investigating and defending claims, is an incident of the work and a necessary part of its total cost."

"Workmen's compensation insurance," which does not differ in principle from insurance against liability to the public here involved, was expressly approved under this contract (Finding IV, record, near top p. 10).

In *Lovell* v. *United States*, 46 C. Cls. 318, 342; 47 C. Cls. 361, 371, it was held that where work "was to be paid for at actual necessary cost" such costs "included the liability insurance of men."

The decision of the Comptroller of the Treasury in 1915, in *Scott's* case (22 Comp. Dec. 261, 262) held that under a cost-plus contract the actual cost of liability insurance carried by a contractor as a protection against accidents is a part of the actual cost of labor and must be allowed accordingly.

In *Arizona Employers' Liability* cases, 250 U. S. 400, this court recognized that the damage caused by accidents was a part of the cost of the work.

The court said, in the opinion by Mr. Justice Pitney (p. 422), that the employer has an opportunity "to charge the loss as a part of the cost of the product of the industry."

Again (p. 424):

"The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward."

Insurance against liability for accidents to the public is equally a legitimate part of the cost of the work.

It has already been allowed under two similar contracts. Unless some technical rule of law requires this court to shut its eyes to facts conceded and published in official reports it should be allowed here.

Advantage of Insurance to the United States.

By the Report of the Assistant Attorney General, in Charge of the Defense of Suits against the United

States in the Court of Claims, it appears (Annual Report of Attorney General, 1920, pp. 57, 58; same for 1921, p. 41):

"Many of these involve the supervision of the defense of suits brought against Government contractors growing out of the execution of cost-plus contracts, wherein the United States has agreed to indemnify the contractor for all expenses and losses sustained in the execution of the contract. As a judgment against a contractor in this character of litigation may result in additional cost being charged against the contract, to be paid by the Government, it becomes the duty of this department to either defend such suits or to assist counsel for the contractors in the preparation of their defense."

Insurance policies of this kind take all the burden of defense of such suits off the United States as well as off the contractor. It is therefore a decided advantage to the United States to get the benefit of such insurance policies and to be thereby protected from just such suits as are here referred to.

Reference to General Findings in Cases.

We have deemed ourselves at liberty to ask the attention of the court to the findings in the two cases of *Mason & Hanger Company* which reached this court and *Bates & Rogers Construction Company* which did not reach this court. These findings are of a general character and relate to the whole series of sixteen cantonment contracts. Their truth was conceded by the Government in the *Bates & Rogers* case, Finding VI, memorandum opinion, 58 C. Cls. 391, 392.

They come within the rule in *Reading Steel Casting Company* v. *United States*, 268 U. S. 186, 188:

"The facts admitted and the concessions made by the parties may be considered with the findings of fact made by the district court."

In *Ceballos* v. *United States*, 214 U. S. 47, the court in construing a contract gave determinative effect to the construction placed upon a previous contract not found by the Court of Claims, and printed only in one of the briefs, but which was admittedly a correct copy (pp. 49–52).

In *New York Indians* v. *United States*, 170 U. S. 1, 32, this court was asked to take into consideration documents bearing on the claim of those Indians. The court said (p. 32):

"It is insisted by the Attorney General that, as these documents are not referred to in the findings of fact by the court below, this court can not consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. *Jones* v. *United States*, 137 U. S. 202, 214.

"While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance."

Equally, are the general facts found by the Court of Claims in the *Bates & Rogers* case and there conceded by the Government as to all sixteen of the cantonment contracts to be considered here as a concession made by the Government in an exactly similar case and a finding of fact based upon that concession.

This fact should be considered with those embodied

in the findings, in order to prevent a failure of justice. Otherwise items allowed to two of sixteen cantonment contractors will be denied under precisely similar circumstances to a third.

Conclusion.

The judgment should be reversed and the case remanded to the Court of Claims for further proceedings.

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